

**BMC America, Inc., a Subsidiary of Cannon Ball Industries, Inc., a Successor of BMC Products, Inc. and/or BMC Products, Inc. and Geniro Garcia.** Case 13-CA-27594

August 27, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT AND DEVANEY

On June 27, 1990, Administrative Law Judge Irwin H. Socoloff issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that Respondent BMC America, Inc., a subsidiary of Cannon Ball Industries, Inc. (BMC America) was a successor to Respondent BMC Products, Inc. (BMC Products). No exception was filed to this finding and we therefore adopt it. The judge further found that BMC Products did not violate Section 8(a)(1) or (4) of the Act by threatening to discharge and discharging its employees. Accordingly, he recommended that the complaint be dismissed in its entirety. For the reasons set forth below, we find merit in the General Counsel's exceptions.

The following factual summary is based on the judge's findings and the uncontradicted record testimony.<sup>1</sup> Until March 11, 1988, BMC Products manufactured recreational vehicle parts and office equipment. In February 1988, BMC Products entered into an asset purchase agreement with BMC America, under which BMC America agreed to buy the business and substantially all the assets of BMC Products. The closing occurred on the evening of March 11, 1988. At the time of the sale, BMC Products' employees, represented by the Chemical and Allied Products Workers Union, were covered by a collective-bargaining agreement that expired May 31, 1990. The agreement contained seniority and pension contribution provisions, grievance and arbitration provisions, and a no-strike/no-lockout clause. The agreement also provided:

In the event that the plant and/or any of its operations are moved, or the name is changed by any of the owners, this contract between the parties shall continue in effect until its expiration date and all the employees shall be offered the opportunity to transfer.

<sup>1</sup> It is well established that the Board may rely on uncontradicted testimony in the record that the judge failed to discuss. *Douglas Aircraft Co.*, 238 NLRB 668, 671 fn. 20 (1978), enf'd. 655 F.2d 932, 938 (9th Cir. 1981).

By letter dated March 3, 1988, the Union was advised that BMC America would purchase the assets and business of BMC Products, and that, following the March 11 closing, BMC Products would discontinue business. The letter also advised the Union that BMC America elected not to assume the collective-bargaining agreement.

Following receipt of this letter, the Union met with and negotiated a new contract with BMC America. The new agreement was substantially identical to the one between the Union and BMC Products, with two exceptions: BMC America refused to recognize the seniority dates of BMC Products' employees and it refused to continue payments into the employees' pension fund.<sup>2</sup>

After negotiation of the new contract, union officials and representatives of BMC Products met with unit employees on the morning of Thursday, March 10, 1988.<sup>3</sup> The Union told the employees about the impending sale and that the closing would occur the next day. The employees were told to fill out new employment applications the following day and to call over the weekend to find out whether BMC America would employ them.<sup>4</sup>

At the meeting, Union Business Agent Rose Alvarez discussed the new contract and told the employees that the only changes from the then-existing contract were with regard to seniority and pension contributions. The Union also told the employees that BMC America would phase out the Chicago facility within 3 to 6 months. Rosenia told employees that anyone who wished to transfer to the new facility in Harvard, Illinois, would be welcome.<sup>5</sup>

<sup>2</sup> The contract also contained the following provision:

The Company has acquired certain assets and liabilities of BMC Products, Inc., which are presently located at 4630 W. Harrison Street, Chicago, Illinois. The Company intends to transport the equipment and business to its existing production facility in Harvard, Illinois. Prior to relocation, the Company desires to operate the business at its present location on an interim basis only. The Company and the Union acknowledge the temporary nature of this operation and the right of the Company to transfer and relocate all and any part of the business from its present location to Harvard, Illinois, at any time and from time-to-time.

<sup>3</sup> Union Business Agent Rose Alvarez and Union Steward Rubin Gray were among those representing the Union. Employee Relations Manager Mike Rosenia and Maintenance Foreman Jim Mundo represented management. Gray was bilingual and interpreted for Alvarez as she spoke to the group of predominantly Spanish-speaking employees.

<sup>4</sup> Several days prior to March 11, 1988, BMC America had prepared a letter to each employee either offering him continued employment with BMC America, or asking him to call over the weekend to see whether he would be hired. Offers of employment, however, may have been conditioned on the employee's filling out a new employment application between 11 a.m. and noon on March 11. Employees received their letters as they left work on March 11. The discriminatees in this case were not present either to fill out the applications or to receive their letters. They had already been discharged, so they did not return to work after their visit to the Board.

BMC America hired about 90 percent of BMC Products' employees.

<sup>5</sup> BMC America began gradually discontinuing operations at the Chicago facility in June 1988, on a department-by-department basis. The shipping department was shut down on July 5, 1988. The packaging department was shut down on September 16, 1988. The entire move was complete by October 20,

Employee Guadalupe Alejandres asked why BMC Products had been sold and why the employees had not received 60 days' notice of the sale. He also pointed out to Alvarez the contractual clause providing for the continuation of the contract's terms if the Company's name or ownership changed. Alvarez responded, "Do what you want, you are a lawyer?"<sup>6</sup> Alejandres then told Alvarez, "I am going to the Labor Department [to determine whether Respondents are] in the right."<sup>7</sup> Alvarez responded, "Do what you want."

During the lunchbreak on the day of the meeting, Alejandres asked his supervisor, Minish Patel, for permission to go to the "Labor Department," and Patel responded, "You go tomorrow, today it is late." After work on the same day, Alejandres called the Chicago office of the Board and asked to speak with someone who was fluent in Spanish, but was told that there were no Spanish-speaking employees in the office at that time.<sup>8</sup>

On March 11, first-shift employees began work at 7 a.m.<sup>9</sup> Alejandres, who worked in the packaging department, told another packaging department employee, Tranquilino Patino, about the previous day's meeting, which Patino had not attended. Patino testified that, as he and Alejandres talked, they "started seeing that there was some injustices that the company wanted to do to us," and decided to try to get more coworkers "to go and ask the Department of Labor . . . about the rights that the company had towards us." Patino spoke with other packaging department employees, who agreed to go with Alejandres and Patino to the Board's offices. He then told Supervisor Patel that he was getting some workers together to go to the Board. According to Patino, Patel responded, "Go ahead. I don't care." Patino showed Patel the contract and told him that he thought "the company was doing some injustice," but Patel did not want to see the contract and again said, "Go ahead. I don't care." Alejandres also told Patel that he was going to the Board, and Patel responded, "Go, I can't stop you." After talking to Patel, Patino went to the shipping department and

spoke to other employees, who agreed to go to the Board.<sup>10</sup>

Eight employees went to the timeclock to punch out, but they could not find their timecards.<sup>11</sup> They proceeded to the personnel office, where they encountered Employee Relations Manager Mike Rosenia and other management personnel. The employees asked the office secretary for their timecards, and she told them that they were still at the timeclock.

As the employees started to return to the timeclock, Rosenia asked them what they were doing.<sup>12</sup> One of the employees told him that they were going to the Board.<sup>13</sup> After hearing this, Rosenia asked, "Why are you going there?" The employees did not respond but moved to the timeclock. According to Patino, Rosenia "was bothered and asked us what we were going to do there, and did we want to put him under."<sup>14</sup> Rosenia raised his voice and said to the group of employees, "If you punch your card out, you are gone from the company. You are out of the company."

After the eight employees left the plant, they waited for employee Santos Contreros, who was supposed to join them. When Contreros did not appear, Alejandres returned to the plant door where he found Contreros with Maintenance Foreman Jim Mundo.<sup>15</sup> Mundo asked Contreros where he was going, and Contreros replied that he was leaving with the others. Mundo told Contreros that, if he left, Mundo would discharge both Contreros and his wife.<sup>16</sup> Contreros decided not to leave, and he returned to work.

The employees went to the Chicago Regional Office, where they stayed for between 45 and 90 minutes. They had originally planned to return to work immediately after the visit to the Board, but because Rosenia had told them they were discharged for leaving work, Garcia filed a charge alleging that he and the other seven employees had been unlawfully discharged.<sup>17</sup> Following the advice of the Board agent, they went to the union hall to file a grievance. At the union hall, Business Agent Alvarez told them she believed management was justified in firing them because they had walked off the job. Nevertheless, she filled out grievances for each of the eight employees

1988. Although all the employees were offered the chance to transfer to the new location in Harvard, Illinois, none of them chose to do so.

As noted above, the judge found that BMC America was a successor to BMC Products. He also found that because Mike Rosenia continued in his capacity as employee relations manager for BMC America without interruption, BMC America acquired the business with actual knowledge of the facts and events surrounding the alleged unfair labor practices.

<sup>6</sup> The judge did not note Alvarez' response, but Alejandres' testimony is uncontradicted.

<sup>7</sup> It is undisputed that the "Labor Department" was a reference to the National Labor Relations Board.

<sup>8</sup> The judge did not note Alejandres' call to the Board.

Alejandres testified that he had learned the number of the Board's Chicago office, in 1987, from an attorney he spoke to when he had had an accident at the plant and was fired. He said, in connection with that incident, "The Union didn't do anything for me." At the hearing, the General Counsel argued that incident helped explain why, in the present case, Alejandres went to the Board instead of further appealing to the Union.

<sup>9</sup> The first shift workday ended at 3:30 p.m.

<sup>10</sup> The judge did not note the conversations between Alejandres and Patel or between Patino and Patel. Patel did not testify at the hearing.

<sup>11</sup> The personnel office collected all the timecards from the timeclock each morning.

<sup>12</sup> Rosenia offered to call the union business agent to resolve whatever problems they might have, but received no response to the offer. It is not clear whether Rosenia made the offer before or after hearing that the employees were going to the Board.

<sup>13</sup> The judge discredited Rosenia's testimony that no one responded to his question.

<sup>14</sup> The judge did not note Rosenia's response, but Patino's testimony was not specifically contradicted.

<sup>15</sup> The judge found that Mundo was a statutory supervisor.

<sup>16</sup> Contreros' wife worked for BMC Products but was not among the group of employees about to leave work.

<sup>17</sup> Garcia spoke to the Board agent on behalf of the employees because he was the only one fluent in English.

alleging unjust termination and requesting reinstatement.

After the employees left the plant, management shut down one of the seven or eight packing lines in the packaging department and reassigned employees to help out in the shipping department. The judge found, however, that the employees' absence "did not cause any serious disruption to BMC Products' operations."<sup>18</sup>

The judge found that in discharging the employees, BMC Products acted pursuant to established company work rules which provided for immediate discharge of employees failing to do assigned work.<sup>19</sup> Although the judge found that the employees informed Rosenia that they were leaving to go to the Board, he also found that the employees refused to tell Rosenia the nature of their grievances. The judge apparently believed that the employees' failure to discuss the grievances in response to Rosenia's inquiries rendered their resort to the Board unprotected activity. Accordingly, he found that the discharges were lawful, and he dismissed the complaint.

Because this case involves employees' access to the Board and its processes, it is controlled by the test articulated by the Board in *Ohmite Mfg. Co.*, 290 NLRB 1036 (1988). In *Ohmite*, the Board addressed the rights of employees under Section 8(a)(4) of the Act to leave work to attend a Board hearing. Overruling precedent,<sup>20</sup> the Board in *Ohmite* held that in determining whether an employer's refusal to allow employees to leave work to attend a Board hearing is unlawful, the burden of proof lies with the General Counsel:

to prove that the employer's refusal was improperly motivated or that the employees demonstrated to the employer at the time of their request that they had a real need to attend the hearing. Only when the General Counsel has presented prima facie evidence of either or both of the above will the burden shift to the employer to either discredit the General Counsel's evidence or, as to the latter, show an overriding business reason for its refusal to allow the employees to leave work.

*Ohmite*, supra, 1038.<sup>21</sup>

Applying the *Ohmite* test to the facts of this case, we find that the General Counsel has proved that the employees had a real need to go to the Board on the morning of March 11, 1988, and that they dem-

onstrated this need to management. We further find that the Respondents have not rebutted the General Counsel's prima facie case by showing an overriding business reason for the refusal to excuse the employees from work.

The eight employees who left work on the morning of March 11, 1988, to go to the Board were apprehensive because they had learned the previous day that BMC Products was about to be sold; that they might lose their jobs; and that, even if hired by the new owner, they would lose significant benefits. The employees believed that their collective-bargaining agreement prohibited the changes in their benefits under these circumstances. The Union, at the March 10, 1988 meeting, failed to alleviate the employees' concerns. Later that day, Alejandres contacted the Chicago Regional Office by telephone to ask whether the Respondents' actions were lawful, but was told there was no Spanish-speaking agent available. Employee Patino tried, unsuccessfully, to elicit a response from Supervisor Patel about a possible contract violation. With only a few hours remaining before the changes in their contract terms were to be implemented, and having failed to obtain answers from either management or the Union, the eight employees decided to leave work to speak to a Board agent in person, at a time when they thought their actions might still have some effect.<sup>22</sup> We find, based on these circumstances, that the employees had a real need to go to the Board at the time they did.<sup>23</sup>

<sup>22</sup> Our dissenting colleague, who would find a real need to go to the Board during working hours only when the Board offices are closed during employees' off-duty hours, refuses to view the facts in context—the need for the employees to take immediate action, which resulted from their honoring a supervisor's request, on March 10, that they go the next day, and their need to return to work by 11 to fill out new employment applications.

<sup>23</sup> We find support for our position in *General Nutrition Center*, 221 NLRB 850 (1975). In that case, the Board found that the employer violated Sec. 8(a)(4) and (1) by discharging employees for announcing their intention to go to the Board during working hours. As explained by the dissenting opinion in *Earringhouse Imports*, 227 NLRB 1107 (1977), enf. denied sub nom. *Service Employees Local 250 v. NLRB*, 600 F.2d 930 (D.C. Cir. 1979), *General Nutrition* relied on two rationales for finding the employees' conduct to be protected by the Act. First, the employees' conduct constituted "a concerted action concerning terms and conditions of employment." Second, "it was the only practically feasible way for the employees, who were unsophisticated with respect to the niceties of labor relations and the Board's operations, to bring their grievances to the Board and obtain its consideration of their complaints." 227 NLRB at 1114. This analysis of *General Nutrition* by the *Earringhouse* dissent is particularly significant for our purposes because the *Earringhouse* dissent provided the basis for *Ohmite*.

Our dissenting colleague, who also dissented in *Ohmite*, dismisses the *General Nutrition* case as inapposite on the ground that the employees there could have engaged in a protected strike, while the employees here were barred from striking by a no-strike clause in the collective-bargaining agreement. We find, however, in agreement with the General Counsel, that the employees' action in the instant case did not constitute a strike. See *Empire Steel Mfg. Co.*, 234 NLRB 530, 532 (1978) (defining a strike as conduct intended "to bring pressure upon an employer to change his ways"). The employees left work for the purpose of obtaining employment-related information from the Board, not for the purpose of pressuring their employer. Therefore, the employees' concerted activity concerning their terms and conditions of employment was not rendered unprotected by virtue of the no-strike clause in the contract, and we reject our dissenting colleague's attempt to distinguish *General Nutrition* on the basis of a no-strike clause that has no application to the facts of this case.

<sup>18</sup> There is no exception to this finding.

<sup>19</sup> The judge rejected the argument that the employees voluntarily quit.

<sup>20</sup> *Earringhouse Imports*, 227 NLRB 1107 (1977), enf. denied sub nom. *Service Employees Local 250 v. NLRB*, 600 F.2d 930 (D.C. Cir. 1979).

<sup>21</sup> In *Ohmite*, the Board held that an employer did not violate the Act by refusing to allow an employee an excused absence to attend a Board hearing. There was no evidence in that case of improper motivation or union animus behind the refusal, and the employee, who had not been subpoenaed, did not demonstrate a real need to attend the hearing.

We further find that the employees demonstrated this need to management. Employee Alejandres raised employees' specific concerns to the union business agent at the March 10 meeting. Rosenia witnessed Alejandres' objection to the sale and to the cessation of employees' benefits, and, immediately afterward, heard Alejandres tell Alvarez he was going to the Board to see if Respondents were "in the right." Thus, Rosenia was on notice of the employees' fears that their contractual rights were in jeopardy—a problem employees would naturally look to the Board to remedy. Before leaving on the morning of March 11, Patino showed Supervisor Patel the contract and told him he thought employees were being treated unjustly. Although the employees did not engage in a detailed conversation with Rosenia about what their concerns were as they were leaving, they told him they were going to the Board and had only the previous day voiced their concerns in his presence. Contrary to the judge, we believe it is reasonable to find that, under these circumstances, management was aware of the employees' concerns and that they were going to the Board because of those concerns.<sup>24</sup>

Finally, we find that the Respondents have not shown an overriding business reason for discharging the employees. Only 8 of approximately 100 workers absented themselves from work on the day of the incident. Although one line was shut down and a few employees reassigned, there was no serious disruption to BMC Products' operations.<sup>25</sup>

Accordingly, we find that BMC Products violated Section 8(a)(4) and (1) by discharging the eight employees who left work with the stated intention of going to the Board. In light of our conclusion with respect to the discharges, it follows that BMC Products also violated Section 8(a)(1) by threatening employee Contreros and his wife with discharge if Contreros joined the other employees in going to the Board.

#### AMENDED CONCLUSIONS OF LAW

Delete the judge's Conclusion of Law 3 and substitute the following:

*General Nutrition* was also based on the rationale that the employees' action was the only practically feasible way for them to bring their grievances to the attention of the Board. As explained above, a similar finding is warranted here.

<sup>24</sup> Given our disposition of the case based on the evidence the judge considered, we find it unnecessary to pass on the General Counsel's exception regarding the judge's rejection of a position letter written by Respondents' attorney.

<sup>25</sup> Our dissenting colleague misconstrues our holding. We have not reduced *Ohmite's* "demonstration" requirement. Rather, the record shows that the employees satisfied *Ohmite's* requirement of demonstrating to the Respondent their need to go to the Board. Employees had voiced their concerns to both upper management and a supervisor. Under these circumstances, we disagree with our dissenting colleague that when the employees told Rosenia they were going to the Board, they acted at their peril because they had failed to communicate adequately their reasons for going. We would not require employers to guess their employees' intent, as the dissent suggests, but neither would we allow employers to escape liability for unlawful conduct by pleading ignorance where, as here, they had actual knowledge of the employees' motivation.

"3. BMC America acquired BMC Products with actual knowledge of the events surrounding the unfair labor practices.

"4. By discharging employees Garcia, Alejandres, Arizaga, Coronado, Patino, Jiminez, Mireles, and Ocegüera for leaving work because they intended to go to the offices of the National Labor Relations Board, BMC Products violated Section 8(a)(4) and (1) of the Act.

"5. By threatening to discharge employee Santos Contreros and his wife if Contreros left work to go to the offices of the National Labor Relations Board, BMC Products violated Section 8(a)(1) of the Act."

#### REMEDY

Having found that Respondent BMC Products has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Because Respondent BMC America is a successor to BMC Products and acquired BMC Products with actual knowledge of the events surrounding the unfair labor practices, we shall hold BMC America jointly and severally liable with BMC Products to make whole the discharged employees and to reinstate them, if appropriate.

We shall order Respondents to make the unlawfully discharged employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, from March 11, 1988, the date they were unlawfully discharged, until the date on which their respective departments moved to Harvard, Illinois, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), unless Respondents can show that BMC America would not have offered them continued employment.<sup>26</sup>

We shall order BMC America to offer the unlawfully discharged employees immediate and full reinstatement at its Harvard, Illinois facility, unless Respondents can show that they would not have transferred. In addition, Respondents shall make whole any employee so reinstated for any loss of earnings and other benefits, from the date his department was moved to the Harvard facility, as prescribed in *F. W. Woolworth Co.*, supra, plus interest as computed in *New Horizons for the Retarded*, supra. See *Medallion Kitchens*, 277 NLRB 1606 (1986).

In view of the fact that BMC Products is no longer in business, we shall order it to mail copies of the attached notice to the last known address of each employee who was in the bargaining unit on March 11, 1988, the date of the sale to BMC America.

<sup>26</sup> We leave to compliance questions such as whether filling out an application was a prerequisite to receiving an employment offer and whether the discriminatees would have applied had they not been discharged.

## ORDER

A. The National Labor Relations Board orders that Respondent BMC Products, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees for leaving work because they intend to go to the offices of the National Labor Relations Board.

(b) Threatening employees with discharge if they leave work to go to the offices of the National Labor Relations Board.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Jointly and severally with Respondent BMC America make whole the unlawfully discharged employees for any loss of earnings and other benefits from March 11, 1988, until the date on which their respective departments moved to Harvard, Illinois, unless the Respondents can show that BMC America would not have offered them continued employment, in the manner set forth in the remedy section of this decision.

(b) Jointly and severally with Respondent BMC America make whole any unlawfully discharged employee who is reinstated at BMC America's Harvard, Illinois facility for any loss of earnings and other benefits from the date his department moved to Harvard, Illinois, in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, wage rate and other records, work schedules, production reports and data, social security payment records, timecards, personnel records and reports, and all other records and entries necessary to determine the sums due under this Order.

(d) Mail a copy of the attached notice marked "Appendix,"<sup>27</sup> in English and Spanish, to each employee who was in the bargaining unit at BMC Products on March 11, 1988. Copies of the notice, on forms provided by the Regional Director for Region 13, shall be mailed by BMC Products immediately on receipt thereof.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

B. The National Labor Relations Board orders that Respondent BMC America, Inc., a subsidiary of Can-

non Ball Industries, Inc., Harvard, Illinois, its officers, agents, successors, and assigns, shall

Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Jointly and severally with Respondent BMC Products, Inc. make whole the employees BMC Products unlawfully discharged for any loss of earnings and other benefits from March 11, 1988, until the date on which their respective departments moved to Harvard, Illinois, unless Respondents can show that BMC America would not have offered them continued employment, in the manner set forth in the remedy section of this decision.

(b) Offer the unlawfully discharged employees immediate and full reinstatement at the Harvard, Illinois facility, unless Respondents can show that they would not have transferred, and make whole any employee so reinstated for any loss of earnings and other benefits from the date his department moved, in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, wage rate and other records, work schedules, production reports and data, social security payment records, timecards, personnel records and reports, and all other records and entries necessary to determine the sums due under this Order.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

CHAIRMAN STEPHENS, dissenting.

I agree with my colleagues that *Ohmite* is the applicable precedent, but I do not agree that a proper application of the *Ohmite* test leads to the conclusion that the Respondent violated the Act by discharging the eight employees for leaving in the middle of their shift to go to the Board. Indeed, although I dissented in *Ohmite* and would have found a violation there, I would not find a violation here even under the balancing test that I favored.

As the majority has explained, to make out a prima facie case under *Ohmite* that an employer has violated the Act by discharging or disciplining employees for leaving work without permission to go to the Board offices, the General Counsel must prove either that the employer's decision was "improperly motivated" or that "the employees demonstrated to the employer at the time of their request that they had a real need to attend the hearing." My colleagues properly do not attempt to rely on the first basis because there was no evidence here of unlawful motivation. What this comes down to is a question of whether "the employees demonstrated to the employer at the time of their request that they had a *real need*" (emphasis added) to go to the Board offices at that particular time.

<sup>27</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The majority misconstrues and misapplies this test in two main respects. First, its treatment of the “real need” factor seems totally at odds with the majority’s treatment of that factor in *Ohmite*. In *Ohmite*, the concept of “need” related not to any emotional need of employees for advice from some authoritative source, but to the functional requirements of agency proceedings, such as the need to attend a Board hearing as a witness. There was no Board proceeding in this case which employees wished to attend and I cannot agree that the employees’ desire to travel to the Board to gather information meets the “read need” test.<sup>1</sup>

Beyond this, I note that there was no showing that the employees could not have gone to the Board when their shift ended, at 3:30 p.m., either Thursday, March 10 or Friday, March 11, or for that matter, the following week. There was also no demonstrated necessity for all eight employees to go. Because it appears that only employee Garcia was proficient in English, he alone could have carried the employees’ concerns to the Regional Office and obtained the information or guidance they sought.

Second, the majority reduces the requirement of “demonstration” of need at the time of the request to almost nothing. It is undisputed that at the time they left the plant, the eight employees were not clear in communicating why they were going to the Board. They merely stated they were going to the Board, and then left. In my view, by refusing Employee Relations Manager Rosenia’s legitimate requests for an explanation, the employees acted at their own peril. This is especially so in view of the fact that he offered to call their union representative in an effort to adjust the problem. Thus, *Ohmite*’s requirements of clear communication and explanation of why departure at that time is necessary were not met here.

The majority seems to construe *Ohmite* as allowing an inquiry into what employees would have believed or how they might likely have behaved under these circumstances. They conclude that the employees’ concerns about the imminent sale of their company, and the fact that one employee expressed intention to go to the Board in a meeting the day before somehow excuse their failing to satisfy *Ohmite*’s requirement of ac-

tual communication to the employer of the reasons for going to the Board. There is nothing in the language of *Ohmite* which requires the employer to divine the employees’ intent or motivation based on past questions they may have asked or conversation they may have had with a low-level supervisor. I believe actual notice to the employer of their reasons is necessary, as well as a showing of “real need,” and that both of these must be given to the employer at the time the employees seek to leave the job.

Even under the test I advocated in my *Ohmite* dissent—which led me to find a violation when the *Ohmite* majority would not—I would not find a violation under these circumstances. In that case, while I agreed with the majority that in the absence of any indication of an employee’s need to attend the Board proceeding, the employer is under no obligation to show any business reason for denying the employee permission to do so, I was not willing to find that the demonstration of the employee’s need be exceptionally strong before the employer has at least some burden of explanation. I urged that the inquiry balance the employee’s need to attend against the employer’s interest in having him or her remain on the job, and suggested that any indication that an employee’s presence at a proceeding might be useful should trigger a burden of inquiry on the employer’s part to determine if some reasonable accommodation might be made.

Here, I am unable to find that the employees met even my lower threshold test, because what they told their employer as they were leaving the plant failed to demonstrate any need to go to the Board at that particular time. In my view, the General Counsel’s case fails at this point. We need not even get to the other part of the inquiry, that is, what the Employer’s justification might have been for denying them permission to leave.<sup>2</sup>

I am not unsympathetic to employees who face a radical change in the working conditions and who wish to do more than consult their union representative by telephone or wait until the end of their shift to seek answers from a government agency. I emphasize that I am not suggesting that employees have no statutory right to seek information from the Board. I disagree, however, that this right entails the additional right of walking off the job for that purpose during working time over the objection of their supervisor, at least in circumstances in which it not claimed that Section 7 would protect a walkout to protest the matters that are the subject of their information seeking.

In this regard, it is noteworthy that counsel for the General Counsel disclaimed any intent to present the employees’ action as a protected walkout over work-

<sup>1</sup> Even if the employees had in mind the possibility of filing a charge with the Board (and thereby initiating an agency proceeding), I still would not find that the “real need” test is met. If we were to conclude that the test is met simply by a showing that an employee has a reasonable belief that he or she may have grounds for filing a charge with the Board over some action to be implemented in the immediate future, then it is hard to see why this would not make it permissible for employees to leave work whenever they want to visit the Board with a view to possibly filing charges over unlawful warnings, transfers, demotions, wages reductions or other changes in terms and conditions, so long as they fear immediate implementation of the change and their employer cannot prove that it has an “overriding business reason” to deny them permission to go at that particular time. I cannot see the justification, absent evidence that working hours are the only time in which a charge could possibly be filed, for requiring employers to prove an “overriding business reason” before they can require that the employee finish the shift before going to file the charge.

<sup>2</sup> Had the employees told the Employer their reasons, it is certainly possible that some accommodation would have been made for them, and this case would not now be before us.

place grievances as in, for example, *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). She doubtless took this tack because both the Union's agreement with the predecessor employer in the present case and its agreement with the successor contained a no-strike clause and because no recognized exceptions to no-strike clauses would appear to apply here, e.g., triggering serious unfair labor practices, as in *Mastro Plastics v. NLRB*, 350 U.S. 270 (1956), or abnormally dangerous working conditions within the meaning of Section 502 of the Act.

Because these employees had no right under the Act to walk off the job in protest of their grievances over their terms and conditions of employment, I regard *General Nutrition Center*, 221 NLRB 850 (1975), as inapposite, notwithstanding that it was cited in a dissent that provided the rationale for *Ohmite*. As the administrative law judge in *General Nutrition* pointed out (id. at 856; footnotes omitted):

[T]he employees could not have been lawfully discharged if they had merely engaged in a concerted withholding of their services—whether or not at a time convenient to [their employer] in order to exert economic pressure on [the employer] to redress their grievances. But, the technique which they did select—a 2-hour visit to the NLRB intentionally timed to coincide with the presence in the store of other personnel who could operate it—was less disruptive of [the employer's] operations than a full-scale strike would have been.

I also find inapposite *Empire Steel Mfg. Co.*, 234 NLRB 530 (1978), cited by my colleagues for their conclusion that this is a protected nonstrike walkout. In *Empire*, the judge expressly noted that the employee meeting at issue there, which began during the employees' lunch period, had intruded only briefly into working time. Id. at 532. He contrasted this with the circumstances in a case involving an away-from-the-plant meeting taking 1-1/2 hours from production time. Ibid. (Citation omitted.)

Nevertheless, I would not quibble over whether to term the employees' walkout a "strike." I simply regard it as an unwarranted extension of *Ohmite* to apply it in a case in which no pending Board proceeding was involved and in which employees who have no protected right to walk out in protest over their grievances, have walked off the job for more than 3 hours in order to seek information from the Board concerning those same grievances. And, as explained above, I believe that the majority has applied the particular elements of the *Ohmite* test in a way that is totally at odds with the rationale of that case. I therefore dissent and would adopt the judge's recommendation to dismiss the complaint.

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge employees for leaving work because they intend to go to the offices of the National Labor Relations Board.

WE WILL NOT threaten employees with discharge if they leave work to go to the offices of the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL jointly and severally with BMC America, Inc. make whole, with interest, employees Garcia, Alejandres, Arizaga, Coronado, Patino, Jiminez, Mireles, and Ocegueda for any loss of earnings and other benefits they suffered by reason of our discrimination against them, from March 11, 1988, to the date on which their respective departments moved to the Harvard, Illinois facility, unless we can show that BMC America would not have offered them continued employment.

WE WILL jointly and severally with BMC America, Inc. make whole any unlawfully discharged employee who is reinstated (pursuant to the Board's Order) at BMC America's Harvard, Illinois facility for any loss of earnings and other benefits from the date on which the reinstated employee's department moved to the Harvard facility, with interest.

### BMC PRODUCTS, INC.

*Emilie F. Fall, Esq.*, for the General Counsel.

*Richard F. Nelson, Esq.*, of Chicago, Illinois, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge. On charges filed on March 11 and April 28, 1988, by Geniro Garcia, an individual, against BMC Products, Inc. and BMC America, Inc. (Respondent BMC Products and Respondent BMC America), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 13, issued a complaint dated April 29, 1988, alleging violations by Respondents of Section 8(a)(4) and (1) and Section 2(6) and (7) of the National Labor Relations Act (the Act). Respondents, by their answer, denied the commission of any unfair labor practices.

Pursuant to notice, trial was held before me in Chicago, Illinois, on February 21 and 22, 1989, at which the General Counsel and the Respondents were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Thereafter, the parties filed briefs which have been duly considered.

On the entire record in this case, and from my observations of the witnesses, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

Until March 11, 1988, when it sold its business to Respondent BMC America, Respondent BMC Products was a corporation engaged in the manufacture of recreational vehicle parts and office equipment at its Chicago, Illinois facility. During the year preceding issuance of the complaint, a representative period, Respondent BMC Products, in the course and conduct of its business operations, sold and shipped from its Chicago facility products, goods, and materials valued in excess of \$50,000 directly to points located outside the State of Illinois. In that same time period, it purchased and received, at the Chicago facility products, goods, and materials valued in excess of \$50,000 directly from points located outside the State. I find that Respondent BMC Products, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### II. LABOR ORGANIZATION

Chemical and Allied Product Workers Union, Local No. 20, AFL-CIO (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

### III. THE UNFAIR LABOR PRACTICES

#### A. Background

On February 29, 1988, Respondent BMC Products and Respondent BMC America (incorporated on January 6, 1988, under the name BMC Acquisition Corp.), entered into an asset purchase agreement providing for the purchase by BMC America of the BMC Products business and substantially all the assets owned or used in connection with that business. The closing occurred on March 11, 1988.

Early on March 11, and prior to the closing, employees Geniro Garcia, Guadalupe Alejandres, Jamie Arizaga, Cito Coronado, Tranquilino Patino, Baltazar Jimenez, Eustaquio Mireles, and Guilibold Ocegüera walked off the job and traveled to the offices of the National Labor Relations Board, Region 13, seeking certain information. As a result of the walkout, their employment at BMC Products was terminated and they were not, thereafter, offered jobs by BMC America.

In the instant case, the General Counsel contends that Garcia, Alejandres, Arizaga, Coronado, Patino, Jimenez, Mireles, and Ocegüera were discharged because they stated that they intended to go to the National Labor Relations Board, and because they concertedly sought information from the Board regarding a loss of seniority and pension benefits, in violation of Section 8(a)(4) and (1) of the Act. Respondents argue that the employees were not discharged but, rather, that they voluntarily quit when they walked out during working time without authorization. Alternatively, Respondents urge, the

employees were not engaged in protected concerted activity, or activity otherwise protected under the Act, and, therefore, they were lawfully discharged for walking off the job. Also at issue is whether Respondents violated Section 8(a)(1) of the Act by threatening to discharge employee Santos Contreras, and his wife, if Contreras walked out with the others.<sup>1</sup>

#### B. Facts<sup>2</sup>

At the time of the sale, Respondent BMC Products employed some 100 production and maintenance employees who were represented by the Union and covered by the terms of a collective-bargaining contract. That agreement, by its terms, was effective from June 1, 1987, until May 31, 1990, and contained, inter alia, provisions governing seniority and pension contributions, grievance and arbitration provisions, and a no-strike, no-lockout clause. The agreement also provided:

In the event that the plant and/or any of its operations are moved, or the name is changed by any of the owners, this Contract between the parties shall continue in effect until its expiration date, and all the employees shall be offered the opportunity to transfer.

By letter dated March 3, 1988, Respondents advised the Union that BMC America would purchase the "assets and business" of BMC Products, and that, following closing on March 11, BMC Products would discontinue any business activity. The Union was also advised that BMC America elected not to assume the collective-bargaining agreement. Following receipt of this letter, the Union met with representatives of BMC America and agreed to a contract with that Respondent. The new agreement generally continued the terms and conditions of employment established under the contract between the Union and BMC Products, with two significant exceptions, namely, BMC America refused to recognize the seniority dates of the BMC Products employees, and refused to continue payments into the pension fund. The contract also contained the following provision:

The Company has acquired certain assets and liabilities of BMC Products, Inc., which are presently located at 4630 W. Harrison Street, Chicago, Illinois. The Company intends to transport the equipment and business to its existing production facility in Harvard, Illinois. Prior to relocation, the Company desires to operate the business at its present location on an interim basis only. The Company and the Union acknowledge the temporary nature of this operation and the right of the Company to transfer and relocate all and any part of the business from its present location to Harvard, Illinois, at any time and from time-to-time.

<sup>1</sup>The unfair labor practice allegation regarding the alleged threat to Contreras was added to the complaint at trial. I reject Respondents' argument that it is time-barred as the subject matter of that allegation is intimately related to the subject matter covered by the original charges filed in this case.

<sup>2</sup>The factfindings contained herein are based on a composite of the documentary and testimonial evidence introduced at trial. Where necessary to do so, in order to resolve significant testimonial conflict, credibility resolutions have been set forth, *infra*.

After negotiations between the Union and BMC America were completed, union officials met with the unit employees on Thursday, March 10, at the facility. BMC Products representatives were also present. The employees were advised of the sale and told that the closing would occur on the next day, Friday, March 11. They were asked to fill out new employment applications and to inquire, over the weekend, about whether or not they would be employed by BMC America. Union Business Agent Rose Alvarez discussed the new contract and told the employees that the only changes, from the then-existing contract, were with regard to seniority and pension contributions. The Union also advised the employees that BMC America would, over time, phase out the Chicago operation. Employee Guadalupe Alejandres objected to the new contract and argued that, by its terms, the contract with BMC Products was to remain in effect despite any change in ownership. Alejandres told Alvarez that "I am going to the Labor Department" to find out whether or not Respondents are "in the right."<sup>3</sup>

On Friday, March 11, the first-shift employees reported for work at their normal starting time, 7 a.m. By 8:30 a.m., employees Alejandres and Patino had organized a group of eight employees, from the packing and shipping departments, who decided to walk off the job, and go to the offices of the National Labor Relations Board, to make inquiry concerning the sale of the business and the loss of contractual benefits. The eight employees, Garcia, Alejandres, Arizaga, Coronado, Patino, Jiminez, Mireles, and Ocegüera, proceeded to the timeclock, near the entrance of the plant, in order to punch out. When they could not locate their timecards at the clock, they went to the personnel office where they encountered Employee Relations Manager Michael Rosenia,<sup>4</sup> Shipping Department Supervisor Steve Steppe, and the office secretary, Blanca Marcias. Plant Manager Nataraj Padmanabhan was in an open adjoining office. Also in the area was Union Steward Ruben Gray. The employees asked Marcias for their timecards and she told them that they were still at the timeclock.

Rosenia testified that, as the employees started to return to the timeclock, he, Rosenia, asked them what they were doing, but he received no response. Rosenia stated that it was not right for the employees to walk out, and he offered to call the union business agent to resolve whatever problems might exist. Again, he received no response. Rosenia then asked the steward, Gray, what the problem was, but Gray stated that he did not know. Rosenia further testified that, despite his inquiries, the employees punched out, and left the facility, without telling him the nature of their grievance, in violation of established company work rules providing for immediate discharge for refusal to do assigned work.

Plant Manager Padmanabhan, in his testimony concerning the March 11 walkout, corroborated Rosenia's testimony, asserting that Rosenia repeatedly asked the employees, in Spanish and English, why they were leaving, but none of them would respond.

According to the testimony of employees Garcia, Patino, and Alejandres, one of the departing employees did tell

Rosenia, in response to his questions, that they were going to the Department of Labor. Those employees further testified that Rosenia threatened to discharge any employees who walked out.

I have generally resolved differences in the testimony concerning the events of March 11, in favor of the testimonial account of Rosenia, as he exhibited the surest recollection. However, as none of the witnesses to the March 11 walkout, appeared to me to be testifying in a deliberately untruthful manner, and as it is possible, largely, to harmonize their testimony, I find, based on the collective testimony, that the departing employees refused to tell Rosenia what the nature of their grievance was, or why they were walking out, and refused to accept his offer to call the union business agent in order to resolve whatever problem might exist. The employees did tell Rosenia that they were going to the offices of the National Labor Relations Board and, before they left, Rosenia stated that, under company rules, employees who engaged in an unauthorized walkout would be discharged. I further find, based on the uncontradicted testimony of Rosenia, that, as a result of the walkout, one of the seven or eight packing lines was shut down and it was necessary to transfer employees, from elsewhere in the plant, to help out in the shipping department.

After the eight employees left the plant, they waited for employee Santos Contreras, who was to join them. When Contreras did not appear, Alejandres returned to the door of the plant where he encountered Contreras and Maintenance Foreman Jim Mundo.<sup>5</sup> A conversation between Contreras and Mundo took place and, as Contreras speaks Spanish, only, and Mundo speaks English, only, Alejandres acted as translator. According to the credited, uncontradicted testimony of Alejandres, Mundo asked Contreras where he was going, and Contreras replied that he was leaving with the others. Mundo told Contreras that, if he left, Mundo would discharge both Contreras and his wife. Contreras decided not to leave the plant, and he returned to work.

The eight employees traveled to the Chicago office of the Board and spoke to a Board agent. Garcia filed a charge alleging that the eight employees had been unlawfully discharged. On advice of the Board agent, they then went to the union hall to file a grievance.

On arrival between 10:30 and 11:30 a.m., the employees met with Business Agent Rose Alvarez. They told Alvarez, according to her testimony, that they had walked off the job, and gone to the Labor Board, "because they didn't agree with the Company, the selling of the company." They further advised her that Rosenia had attempted to dissuade them from walking out, telling them:

If you walk out, you will be terminated. We are not firing you, you are walking out. Why don't you call your union, call the business agent, talk to her. Don't do this to yourself.

After telling the employees that they were not within their rights to walk off the job, Alvarez completed grievance

<sup>3</sup>It is undisputed that "the Labor Department," in shop parlance, was a reference to the National Labor Relations Board.

<sup>4</sup>Rosenia had served as the BMC Products manager of employee relations for some 37 years. He continued in that capacity, without interruption, for BMC America. He was, at all times material, a statutory supervisor.

<sup>5</sup>Mundo had authority to hire and fire employees in his department, and responsibly to direct them in their work. Accordingly, he was a statutory supervisor.

forms on their behalf, protesting the terminations and requesting reinstatement of the eight individuals.<sup>6</sup>

The employees returned to the plant at noon, to pick up their paychecks and personal belongings. According to the uncontradicted testimony of Alejandres, he spoke to Plant Manager Padmanabhan at that time, and asked that the employees be reinstated. The request was denied.

By letters dated March 28, 1988, Garcia, Alejandres, Arizaga, Coronado, Patino, Jiminez, Mireles, and Ocegueda were advised by the Union that BMC Products had denied their grievances as, in the Company's view, the employees had voluntarily terminated their employment by walking out. The Union further advised the employees that the Union believed that "the Company acted within their rights." The Union did not further pursue the grievances, nor was it asked to do so by any of the affected employees.<sup>7</sup>

Following the March 11, closing on the asset purchase agreement, Respondent BMC America, without interruption, continued the same business, at the same location, as theretofore conducted by Respondent BMC Products. All the production and maintenance employees hired by BMC America were former employees of BMC Products and, in all, BMC America hired some 90 percent of the former BMC Products work force. BMC America utilized the same supplies and machinery, to manufacture the same products, which were sold, substantially, to the same customers. The BMC America employees performed the same type of work as they had while employed by BMC Products, and they functioned under the same supervisors.

Beginning in June 1988, BMC America gradually shut down the Chicago facility, and transferred operations to Harvard, Illinois. The transfer was accomplished on a department-by-department basis. By October 20, the move was complete, and the Chicago facility, was entirely phased out. All the bargaining unit employees were offered the opportunity to transfer to Harvard. None of them chose to do so.

### C. Conclusions

With respect to Respondents' argument that deference should be given to the grievance decisions, it is sufficient to state that the issues in this case concern access to the Board and, thus, under Board law, deferral is inappropriate. On that basis alone, I reject Respondents' contention in this regard.<sup>8</sup>

I also conclude that Respondent BMC America is the successor to Respondent BMC Products. Thus, beginning March 11, 1988, and for some months thereafter, BMC America, without interruption, continued the same business, at the same location, theretofore run by BMC Products. It produced the same products, using the same machinery, and did business in the same market. All the BMC America unit employees were former employees of BMC Products and, in all, BMC America hired some 90 percent of the former BMC Products work force. Those employees continued to do the

same jobs, in the same departments, under the same supervisors.<sup>9</sup>

The discharges of the eight alleged discriminatees were effectuated by a high level supervisor, Michael Rosenia, on March 11, 1988. Rosenia acted in his capacity as employee relations manager for BMC Products. Later in the day, at closing, Rosenia assumed the same position for BMC America. Thus, BMC America acquired the business with actual knowledge of the facts surrounding the alleged unfair labor practices.<sup>10</sup>

Respondents' contention that the eight individuals who engaged in the walkout were not discharged, but, rather, voluntarily quit, is entirely at odds with the record evidence. However, Respondents' alternative argument, that, in discharging the eight employees who engaged in the walkout, BMC Products acted pursuant to established company work rules, and without discriminatory intent, is unchallenged. The principal issue in this case is whether the employees who walked off the job, to go to the National Labor Relations Board, were engaged in an activity protected by the Act. If so, whether their right to engage in that activity outweighed BMC Products' legitimate interest in maintaining normal production and reasonable order at its plant.<sup>11</sup> In this latter connection, I note the lack of record evidence that the walkout caused any serious disruption to the BMC Products operations.

The alleged discriminatees in this case banded together and walked off the job, without permission, to go to the offices of the National Labor Relations Board, because they opposed the sale of the business and opposed the action of their union in concluding a new collective-bargaining agreement with BMC America, with a resultant loss of benefits. At no time did they communicate the nature of their grievance to Rosenia or any other responsible official of BMC Products. Indeed, despite Rosenia's repeated inquiries, at the time of the walkout, the employees refused to tell him what the nature of their grievances were, or why they were walking out. In declining his offer to call the union business agent, the departing employees informed Rosenia, only, that they were going to the National Labor Relations Board.

As the employees who participated in the walkout refused to bring the nature of their grievances to the attention of management, they were not engaged in protected concerted activity or activity otherwise protected under the Act.<sup>12</sup> Accordingly, the discharges of those individuals did not contravene statutory proscriptions. Further, and in light of my conclusions with respect to the walkout, it follows that BMC Products did not violate the Act by threatening to discharge employee Contreras and his wife if Contreras joined in the unprotected walkout.

### CONCLUSIONS OF LAW

1. Respondent BMC Products, Inc., and its successor, Respondent BMC America, Inc., a subsidiary of Cannon Ball Industries, Inc., are employers engaged in commerce, and in operations affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

<sup>6</sup> Alvarez further testified that, while at the union hall, the employees, speaking through Alejandres, stated that they did not want to return to work and desired, only, to receive their severance and vacation pay. Garcia, Patino, and Alejandres all testified that they went to the union hall, and filed grievances, because they wanted to get their jobs back. In view of the nature of the grievances filed, the testimony of the three employees is more plausible, and their testimony is credited in this regard.

<sup>7</sup> Respondents urge that deference be given to the grievance decisions. Respondents have not expressed a willingness to proceed to arbitration.

<sup>8</sup> *Houston Chronicle Publishing Co.*, 227 NLRB 1829 (1977).

<sup>9</sup> See *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987).

<sup>10</sup> *Cumberland Nursing & Convalescent Center*, 263 NLRB 428 (1982).

<sup>11</sup> See *General Nutrition Center*, 221 NLRB 850 (1975).

<sup>12</sup> See *Carbet Corp.*, 191 NLRB 892 (1971).

2. Chemical and Allied Product Workers Union, Local No. 22, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondents have not violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>13</sup>

#### ORDER

The complaint is dismissed.

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<sup>13</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.